

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SUN OPTICS, INC., a Utah Corporation,)	
)	
Plaintiff,)	
)	
v.)	
)	
FGX INTERNATIONAL, INC., a Delaware)	Civil Action No. 1:07cv137 SLR
Corporation,)	
)	
Defendant.)	
)	

**MOTION FOR LEAVE TO FILE EVIDENCE ARISING AFTER ORAL
ARGUMENTS IN SUPPORT OF PLAINTIFF'S MOTIONS FOR
PRELIMINARY INJUNCTION**

Sun Optics, Inc. ("Sun Optics") hereby moves the Court for leave to submit supplement evidence arising after oral arguments heard on May 18, 2007, in support of Sun Optics's motions for preliminary injunction (Dkt. Nos. 2 and 23). Sun Optics has recently discovered two pieces of evidence not previously available that refute representations and arguments made by FGX International, Inc. ("FGX") in opposition to Sun Optics's motions for preliminary injunction. The first piece of evidence is a copy of pages of the June 18, 2007 publication of *Vision Monday*, an optical trade journal, in which FGX has a full-page advertisement for its accused products that appears a few pages before Sun Optics's full-page advertisement for its patented products. This evidence refutes FGX's arguments and allegations that FGX's accused products do not compete directly with Sun Optics's patented products.

The second piece of evidence is a photograph of products being marketed by FGX at a CVS drugstore. These products were not discovered until July of 2007. This

evidence refutes FGX's representations and arguments that FGX did not use a clear tube product to undermine Sun Optics's attempt to sell its patented products to CVS.

Both of these two pieces of evidence are particularly relevant to proving that Sun Optics has been, and continues to be, irreparably harmed by FGX's infringement. Therefore, Sun Optics respectfully requests that this Court enter an Order granting Sun Optics leave to file the Notice of Supplemental Evidence in Support of Plaintiff's Motions for Preliminary Injunction attached hereto as Exhibit A.

Respectfully submitted,

CONNOLLY BOVE LODGE & HUTZ LLP

By: /s/ Francis DiGiovanni (#3189)
R. Eric Hutz (#2702)
The Nemours Building
1007 N. Orange Street
P. O. Box 2207
Wilmington, DE 19899
Telephone: (302) 658-9141
Attorneys for Plaintiff
Sun Optics, Inc.

OF COUNSEL:
LARRY R. LAYCOCK
CHAD E. NYDEGGER
WORKMAN | NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 533-9800
Attorneys for Plaintiff SUN OPTICS, INC.

DATE: July 5, 2007
551047_1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SUN OPTICS, INC., a Utah Corporation,

Plaintiff,

v.

FGX INTERNATIONAL, INC., a Delaware
Corporation,

Defendant.

Civil Action No. 1:07cv137 SLR

**[PROPOSED] ORDER GRANTING MOTION FOR LEAVE TO SUBMIT
EVIDENCE ARISING AFTER ORAL ARGUMENTS IN SUPPORT OF
MOTIONS FOR PRELIMINARY INJUNCTION**

The Court, having considered Plaintiff Sun Optics, Inc.'s ("Sun Optics") Motion for Leave To Submit Evidence Arising After Oral Arguments in Support of Plaintiff's Motions for Preliminary Injunction, and for good cause appearing therefore, Plaintiff Sun Optics's Motion for Leave To Submit Evidence Arising After Oral Arguments in Support of Plaintiff's Motions for Preliminary Injunction is GRANTED.

It is HEREBY ORDERED that the Clerk of the Court enter the Notice of Evidence Arising After Oral Arguments in Support of Plaintiff's Motions for Preliminary Injunction attached as Exhibit A to the Motion for Leave To Submit Evidence Arising After Oral Arguments in Support of Plaintiff's Motions for Preliminary Injunction.

SO ORDERED this ____ day of ____, 2007

BY THE COURT

By _____
Judge Sue L. Robinson
United States District Court Judge

STATEMENT PURSUANT TO LOCAL RULE 7.1.1

I, Francis DiGiovanni, Esq., an attorney for plaintiff, hereby state that the parties attempted to reach an agreement on the matters set forth in PLAINTIFF'S MOTION FOR LEAVE TO FILE EVIDENCE ARISING AFTER ORAL ARGUMENTS IN SUPPORT OF PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION. Specifically, on July 5, 2007, Chad E. Nydegger, Esq., spoke with Adam Landa, Esq., and sought defendant's consent to the relief sought in the motion. Mr. Landa advised Mr. Nydegger that the defendants were unable to consent at that time.

Date: July 5, 2007

/s/ Francis DiGiovanni
Francis DiGiovanni (#3189)

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF DELAWARE

SUN OPTICS, INC.
a Utah Corporation,

Plaintiff,

v.

FGX INTERNATIONAL, INC.,
a Delaware Corporation,

Defendant.

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Civil Action No.07-137 (SLR)

CERTIFICATE OF SERVICE

I, Francis DiGiovanni, hereby certify that on July 5, 2007, I caused to be electronically filed a true and correct copy of the foregoing with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

Donald J. Detweiler, Esquire
Sandra G. M. Selzer, Esquire
GREENBERG TRAURIG, LLP
The Nemours Building
1007 North Orange Street, Suite 1200
Wilmington, DE 19801
Attorney for Defendant
FGX International Inc.

I further certify that on July 5, 2007, I caused a copy of the foregoing to be served by hand delivery on the above-listed counsel of record and the following counsel in the manner indicated:

FEDERAL EXPRESS
Adam B. Landa, Esquire
GREENBERG TRAURIG, LLP
200 Park Avenue
New York, NY 10166

FEDERAL EXPRESS
Steven J. Wadyka, Jr., Esquire
GREENBERG TRAURIG, LLP
1750 Tysons Boulevard, 12th Floor
McLean, VA 22102

/s/ Francis DiGiovanni (#3189)
Francis DiGiovanni (#3189)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

SUN OPTICS, INC., a Utah Corporation,

Plaintiff,

v.

FGX INTERNATIONAL, INC., a Delaware
Corporation,

Defendant.

Civil Action No. 1:07cv137 SLR

**NOTICE OF EVIDENCE ARISING AFTER ORAL ARGUMENTS
IN SUPPORT OF PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION**

CONNOLLY BOVE LODGE & HUTZ LLP

R. ERIC HUTZ (#2702)
The Nemours Building
1007 N. Orange Street
P. O. Box 2702
Wilmington, DE 19899
Phone: (302) 658-9141
Fax: (302) 658-5614
Attorneys for Plaintiff
SUN OPTICS, INC.

OF COUNSEL

LARRY R. LAYCOCK
CHAD E. NYDEGGER
WORKMAN | NYDEGGER
1000 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Phone: (801) 533-9800

DATE: July 5, 2007

Sun Optics, Inc. (“Sun Optics”) hereby submits supplemental evidence for the Court’s consideration in ruling on Sun Optics’s pending motions for preliminary injunction.

On May 18, 2007, the Court heard oral argument on Sun Optics’s motions for preliminary injunction against FGX International, Inc. (“FGX”). At that hearing and in its briefs, FGX argued that Sun Optics is not being irreparably harmed because FGX’s accused products do not compete directly with Sun Optics’s patented products. FGX also argued that Sun Optics’s allegation that FGX used accused products to lure the CVS account from Sun Optics was “absolutely positively unquestionably, indubitably false[.]” [May 18 Transcript, at 62:21-23.] The purpose of this Notice is to inform the Court of evidence arising after the hearing that contradicts these arguments made by FGX and further demonstrates the irreparable harm that Sun Optics is suffering as a result of FGX’s ongoing infringement.

Attached hereto as Exhibit A is a copy of pages of the June 18 publication of *Vision Monday*, an optical trade journal. The Court will see that FGX placed a full one-page advertisement for its accused products that appears opposite to page 53 of the journal. This advertisement by FGX appears a few pages before Sun Optics’s one-page advertisement, which appears opposite page 58 of the magazine, for Sun Optics’s products sold in its patented display system.

This recent development is additional evidence of the aggressive campaign FGX is waging in direct competition with Sun Optics. FGX is using Sun Optics’s patented designs and inventions against Sun Optics to obtain and expand its foothold in this market. This advertisement also contradicts FGX’s representations and arguments to this Court that FGX’s accused products do not compete directly with Sun Optics’s patented products, and that FGX “has no intent of selling these products in Plaintiff’s distribution network.” [D.I. No. 20 (Memorandum in Opposition to Motion for Preliminary Injunction on design patents), at p. 21; *see also* D.I. No. 38 (Memorandum in Opposition

to Motion for Preliminary Injunction on utility patent), at p. 23 (“Plaintiff is defining the broadest possible market in an unwieldy attempt to cast FGX’s Private Eyes as competition to its Clear Tube products.”).]

Notable is the statement in the bottom left portion of FGX’s advertisement seeking “Experienced Representatives needed for fast growing business.” This is not a case where FGX is selling the accused products in its own stores so that money damages would be adequate to compensate Sun Optics for the infringing sales. Instead, FGX is using Sun Optics’s patented designs and products to establish relationships with distributors and ultimately retail customers. No monetary value can be attached to these relationships. The loss of these relationships to Sun Optics is classic irreparable harm, as evidence by the attached advertisements.

Attached as Exhibit B is a photograph of FGX’s clear tube products being sold in a CVS drugstore. Clearly, Sun Optics’s representation to the Court that FGX used a clear tube product merchandised substantially vertically, whether marketed under the Private Eyes or some other brand, to undermine Sun Optics’s attempts to sell its patented products to CVS is true and accurate. [Dkt. No. 24 (Plaintiff’s Memorandum in Support of Its Motion for Preliminary Injunction), at pp. 14-15; Dkt No. 43 (Reply in Support of Motion for Preliminary Injunction), at p. 16; May 18, 2007 Transcript, at 31:19-35:14 and 73:20-77:19.] In so doing, FGX has precluded Sun Optics from developing a relationship with CVS, as Sun Optics was able to do with Rite Aid and displace some of FGX’s product at Rite Aid. This, too, is classic irreparable harm. The Court will recall that FGX asserted that Sun Optics’s allegations regarding loss of the CVS account to a FGX vertical clear tube product was false. [May 18, 2007 Transcript, at 62:2-63:25.]

The foregoing evidence directly contradicts FGX’s argument leading the Court to believe that FGX sells CVS “lots of readers and we do hang tags and we do it in horizontal displays and we do it in all kinds of cases that are not at issue in this case.” [May 18, 2007 Transcript, at 63:4-9.]

Sun Optics respectfully requests the Court to enter the attached after-arising evidence into the record and to consider this evidence when ruling on Sun Optics's motions for preliminary injunction presently pending before the Court.

Respectfully submitted,

CONNOLLY BOVE LODGE & HUTZ LLP

By: /s/ Francis DiGiovanni (#3189)

R. Eric Hutz (#2702)
The Nemours Building
1007 N. Orange Street
P. O. Box 2207
Wilmington, DE 19899
Telephone: (302) 658-9141
Attorneys for Plaintiff
Sun Optics, Inc.

OF COUNSEL:

LARRY R. LAYCOCK

CHAD E. NYDEGGER

WORKMAN | NYDEGGER

1000 Eagle Gate Tower

60 East South Temple

Salt Lake City, Utah 84111

Telephone: (801) 533-9800

Attorneys for Plaintiff SUN OPTICS, INC.

DATE: July 5, 2007

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EXHIBIT A



After finding buyers
for ClearLab Unit,
1-800 Contacts agrees to
merger.

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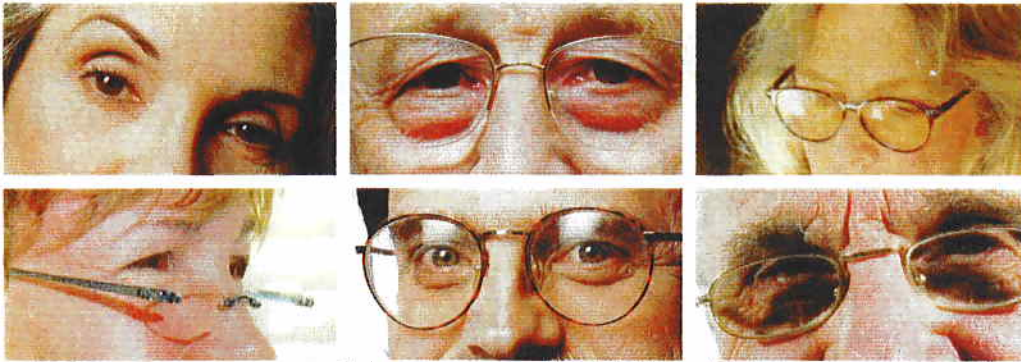
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VOL. 21 NO. 7 \$15

VisionMonday

The Newsmagazine for the Eye Care Industry

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Promoting 'Wellness' Eyecare's Next Big Challenge



The aging of the population, trends in managed health care and new eye health and vision care product technologies are bringing vision care to the forefront in the minds of patients, doctors and legislators. Combined with the prognosis for a higher number of of sight-endangering conditions, the climate is changing, with an opportunity for eyecare to take its place within the "wellness" framework of health care, a concept which is building momentum.

See page 32.

ANNIVERSARY REPORT

20 Years of Change



VM looks at the
changing business landscape for
ECPs and retailers

page **41**

NEWS ANALYSIS

Industry copes with another solutions recall

Companies and ECPs discuss options
with patients, some see boon for
daily disposable CLs.

page **8**

NEWS

• B&L signs \$4.5B merger
pact with Warburg Pincus but
may get other suitors. page 10

• Int'l Vision Expo show
management sets '08 dates;
releases audited attendance
for Expo East. page 16

• Emerging Vision to acquire
The Optical Group. page 18

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RETAIL DISPENSARY

VISION MONDAY/JUNE 18, 2007 53

LAUNCHES

Optima Launches 'Color Free' AR Treatment

STRAITFORD, Conn.—Optima is introducing Color Free, a new AR treatment that eliminates the residual color cast typical of many AR lenses.

"AR color casts not only have a deleterious effect on lens cosmetics, they also reduce the transmission of light and provide less than optimum visual acuity," said Nicholas Nieglew, president and CEO of Optima. "Critical to



"With Color Free AR, Optima has created a lens so clear it appears virtually invisible, to the wearer and the viewer."

—Nicholas Nieglew
president and CEO of Optima

improving light transmission through an AR lens was to eliminate light-absorbing color casts. We accomplished this by using a totally new patented process for our AR lens treatment that does exactly what, and is totally devoid of color. With Color Free AR, Optima has created a lens so clear it appears virtually invisible to the wearer and the viewer."

According to Optima, Color Free AR allows 98.2 percent transmission compared to 96.2 percent transmission for most other AR lenses. The company noted that each tenth of a percent represents significant visual improvement to the eyeless lens wearer. The wearers' reduced glare from back surface reflections, improved eye contact for better communication and reduced eye strain in work settings.

Color Free AR also features Optima's new flash process, CFT (Cryogenically Flash Treated), which is applied post-hydrophobic-oleophobic to provide a tighter molecular bond. The process makes the treatment more durable and repellant to exterior effects, according to Optima.

"Our proprietary CFT patent-pending process fills in the micro-



AR Lens 'X'

AR Lens 'B'

Color Free AR

scopic hills and valleys that make up the hydrophobic coating layer to create an ultra-smooth surface with the highest level of surface dirt and smudge resistance," said Nieglew. "With it, we achieve a hydrophobic coating that is one of the highest-rated, with a water contact rating of 123."



Color Free AR is exclusively available in Optima's Resolution polycarbonate lenses, which are made using Optima's exclusive birefringence-free manufacturing process and an aspheric, astigmatic design that enhances optical precision. The lenses can be ordered through wholesale labs and distribution nationwide. ■

SECOND LOOK

Signet Releases Kodak Precise Short

SAN MARCOS, Calif.—This month, Signet Armonite is introducing the Kodak Precise Short progressive lens. Designed for small, fashionable frames, the lens gives wearers comfortable viewing and easy adaptation, according to Signet.

Kodak Precise Short has a fitting height of 13mm to 14mm. It is available in 1.67 High Index, InstaShades PolyClear, grey and brown, InstaShades PolyClear, grey and brown, InstaShades PolyClear, grey and brown, InstaShades PolyClear, grey and brown, InstaShades PolyClear, grey and brown. Kodak Precise Short continues Signet's use of Vision First Design. This technology allows patients to experience a smooth gradation of power, gentle binocular balance, broad field of view, and quick impact recognition. Signet said, Direct Digital Surfacing ensures prescription accuracy is delivered from the designer's specs directly into the mold. With the combination of Vision First Design and Direct Digital Surfacing, Kodak Precise Short provides a visual experience comparable to a single vision lens, according to Signet.

All Kodak progressives, including Kodak Precise Short, are eligible for PractiCapPlus, Signet's ongoing support program designed to enhance the practice of independent eyecare professionals. When they receive funding, staff training, marketing expertise and technical assistance to ensure customer satisfaction and to promote a strong practice. ■



SECOND LOOK

CZV Offers AO Easy in 1.67 Materials

SAN DIEGO—Carl Zeiss Vision (CZV) has released its AO Easy progressive lenses in 1.67 and 1.67 Transitions Gray high-index materials.

"AO Easy is now available in a comprehensive range of materials," said Steve Mirakos, CZV's vice president of marketing. "This will be a significant benefit to the many eyecare professionals who use AO Easy as their primary progressive lens."

In addition to 1.67 and 1.67 Transitions lenses, AO Easy is available in polycarbonate and polycarbonate Transitions Gray, and hard resin and hard resin Transitions Gray and brown and 1.6 clear. AO Easy is also available as AO Easy HD, which uses free-form manufacturing technology to customize the lens for the individual's total prescription. AO Easy HD is available in 1.67 and 1.67 Transitions Gray.

"Eyecare professionals appreciate AO Easy's combination of large central viewing areas and exceptionally low distortion and swim in the periphery," Mirakos said. "They also appreciate the fact that AO Easy helps them increase their profitability with managed care patients through SOA rebates. Eyecare professionals who pay little can earn \$15 for every pair of AO Easy lenses they order. ■



SECOND LOOK

Essilor Releases Varilux Eclipse 360°

DALLAS—Essilor of America (EOA) has released the Varilux Eclipse 360°, its latest, digitally-surfaced progressive lens.

"Varilux Eclipse is designed specifically for small frames and by combining with 360° Digital Surfacing, we are combining an award-winning exact contour design with the latest digital surfacing process," said Kim Schry, Varilux brand manager. "This new product offers wider fields of vision, less distortion and improved acuity than other short corridor designs."

According to Essilor, the frontside design of a Varilux Eclipse 360° lens is now aligned with the back of the lens using proprietary software, known as Point-By-Point Prescription Mapping, to create an optimized backside design. This optimized backside design is then applied with 360° Digital Surfacing, a patented manufacturing process.

360° Digital Surfacing maintains the integrity of the Varilux Eclipse lens design, which offers a wide viewing area, with 85 percent of power achieved at only 9 mm. Varilux Eclipse lenses offer superior distance vision with a full 140° field of vision. The lenses are designed specifically for presbyopes wearing smaller-sized frames that require a fitting height as low as 14 mm.

Varilux Eclipse 360° lenses are systematically available with Crizal, Crizal Alize or Crizal Alize with Clear Guard.

Also, Essilor is expanding its traditional Varilux Eclipse lens line, which is now available in Thin & Lite 1.60 in both clear and Transitions V H 999.



SECOND LOOK

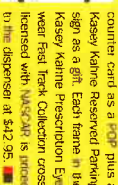
McGee Introduces Kasey Kahne Prescription Eyewear Cross Licensed With NASCAR

MARIETTA, Ga.—The McGee Group presents the Kasey Kahne Prescription Eyewear Fast Track Collection cross-licensed with NASCAR.

The Fast Track Collection offers two race inspired styles.

The stainless steel KK 09 and the acetate KK 11. Both feature aerodynamic temple designs and the Kasey Kahne signature number 9 on the temple tips. Each style is available in two colors, gunmetal and brown for the KK 09 and black and tortoise for the KK 11. Includes a Kasey Kahne case.

Purchase the two style/bout frame Fast Track Collection and receive a Kasey Kahne counter card as a gift plus a Kasey Kahne Reserved Parking sign as a gift. Each frame in the Kasey Kahne Prescription Eyewear Fast Track Collection cross-licensed with NASCAR is priced to the dispenser at \$102.95.



SECOND LOOK

Artoptic Adds Modern Beat to Utempo

NEW YORK—Artoptic International is launching a contemporary, 1960s inspired, 90s inspired, 21st century, 21st century.

Four new styles in the future designed line feature contemporary, fashion colors and a youthful, clean look. Some feature open-kelved design temples and endpieces. Others feature adjustable semi-rimless looks and rectangular shapes.

The line's philosophy is "Contemporary System for the Rhythm of Life." (inspired to the younger crowd). eyewear customer. Utempo is priced to the dispenser at \$54.90.



SECOND LOOK

OCI Presents New Styles in Three Collections

MINNEAPOLIS—OCI introduces new styles in their Compression Mount Rimless, Titanium and Prime Metal collections.

OCI adds five models for individuals seeking lightweight styles with a sophisticated look. These combination frames feature metal fronts and plastic two-toned temples in a variety of colors with adjustable nosepads.

Ten new frames have been added to OCI's Titanium Collection for high-quality, tailored frames with unique styling. Styling elements such as metal, die cuts, engravings and painted patterns give these new additions an innovative feel. They also feature rimless color combinations and popular shapes.

OCI has introduced five new Prime Metal frames for customers who desire great design loaded with personality. These models are made of premium materials for the highest product quality.

These new additions to OCI's collections are priced to the dispenser between \$75 and \$125.



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EXHIBIT B

